

either while testifying, or before testifying if the judge in the judge's discretion determines it is necessary in the interest of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the judge shall examine the writing in camera, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available in the event of review. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires.

**§ 18.613 Prior statements of witnesses.**

(a) *Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in § 18.801(d)(2).

**§ 18.614 Calling and interrogation of witnesses by judge.**

(a) *Calling by the judge.* The judge may, on the judge's own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) *Interrogation by the judge.* The judge may interrogate witnesses, whether called by the judge or by a party.

(c) *Objections.* Objections to the calling of witnesses by the judge or to in-

terrogation by the judge must be timely.

**§ 18.615 Exclusion of witnesses.**

At the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the judge may make the order of the judge's own motion. This rule does not authorize exclusion of a party who is a natural person, or an officer or employee of a party which is not a natural person designated as its representative by its attorney, or a person whose presence is shown by a party to be essential to the presentation of the party's cause.

OPINIONS AND EXPERT TESTIMONY

**§ 18.701 Opinion testimony by lay witnesses.**

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

**§ 18.702 Testimony by experts.**

If scientific, technical, or other specialized knowledge will assist the judge as trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

**§ 18.703 Bases of opinion testimony by experts.**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

**§ 18.704 Opinion on ultimate issue.**

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces

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an ultimate issue to be decided by the judge as trier of fact.

### § 18.705 Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

### § 18.706 Judge appointed experts.

(a) *Appointment.* The judge may on the judge's own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The judge may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of the judge's own selection. An expert witness shall not be appointed by the judge unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the judge in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have an opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the judge or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) *Compensation.* Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the judge may allow. The compensation thus fixed is payable from funds which may be provided by law in hearings involving just compensation under the fifth amendment. In other hearings the compensation shall be paid by the parties in such proportion and at such time as the judge directs, and thereafter charged in like manner as other costs.

(c) *Parties' experts of own selection.* Nothing in this rule limits the parties in calling expert witnesses of their own selection.

## 29 CFR Subtitle A (7-1-01 Edition)

### HEARSAY

### § 18.801 Definitions.

(a) *Statement.* A *statement* is (1) an oral or written assertion, or (2) non-verbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* A *declarant* is a person who makes a statement.

(c) *Hearsay.* *Hearsay* is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay.* A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the hearing and is subject to cross-examination concerning the statement, and the statement is—

(i) Inconsistent with the declarant's testimony, or

(ii) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or

(iii) One of identification of a person made after perceiving the person; or

(2) *Admission by party-opponent.* The statement is offered against a party and is—

(i) The party's own statement in either an individual or a representative capacity, or

(ii) A statement of which the party has manifested an adoption or belief in its truth, or

(iii) A statement by a person authorized by the party to make a statement concerning the subject, or

(iv) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(v) A statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

### § 18.802 Hearsay rule.

Hearsay is not admissible except as provided by these rules, or by rules or regulations of the administrative agency prescribed pursuant to statutory authority, or pursuant to executive order, or by Act of Congress.